BEH HAI MOY

v.

KWONG YIK BANK BHD & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2(S4)-22-549-1994]
11 DECEMBER 2000

CIVIL PROCEDURE: *Preliminary issue - Trial of preliminary issues upon application by defendant - Preliminary issues not raised in defence to action - Defendant sought adjournment of trial to amend defence - Whether adjournment would prejudice plaintiff - Whether defendant to withdraw application with liberty to refile after order to amend defence is given - Uncompromising stand by defendant to do so - Whether application dismissed*

The 1st defendant applied by way of encl. 77 for the hearing of certain preliminary issues on absolute privilege and qualified privilege to be determined before the trial of this action. On the day of the hearing, the 1st defendant requested for an adjournment to amend its statement of defence in view of the plaintiff's challenge that as the preliminary issue on absolute privilege was not raised in the defence to this action, the said issue could not be tried. The court, however, dismissed the application. Hence, this appeal.

Held:

[1] The 1st defendant had no right to file a defence since interlocutory judgment had already been given against it. Further, the entire file showed that there had been no application to set aside the said judgment. The 1st defendant's defence ought to have been rejected by the Registry.

[2] It would have been totally unfair to the plaintiff if the court had conceded to the 1st defendant's application for an adjournment. This case which was filed in 1989 had already taken 11 years to date. Further, before filing encl. 77 to try the issues as preliminary issues, the 1st defendant failed to at least consider its defence. It was an absolute waste of the court's time and an abuse of the process.

[3] The 1st defendant had already filed an application to amend. Based on that, the court had indicated to the 1st defendant that it was prepared to listen to its request if it applied to withdraw encl. 77 with liberty to refile after it had applied and obtained an order to amend the defence. However, for reasons best known to itself the court was told that it could not

withdraw encl. 77. That indicated to the court of an uncompromising stand taken by the 1st defendant in the face of an obvious and blatant error on its part and notwithstanding the fact that the court was willing to give it another chance. Faced with such a stand by the 1st defendant, the court had no choice but to dismiss encl. 77 with costs.

[4] This was not an appealable issue. The court had not gone into the merits. The 1st defendant could well have proceeded to amend. Yet the 1st defendant had persisted with this appeal.

[Appeal dismissed.]

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a), O. 33 r. 2, O. 34

For the 1st defendant - Arun Krishnalingam; M/s Shearn Delamore & Co
For the plaintiff - P Jeyakumar; M/s Zahir Jeya & Zainal

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

The Appeal

This is an appeal by the 1st defendant bank against my dismissal of its application (encl. 77) that pursuant to O. 33 r. 2 of the Rules of the High Court 1980 (the RHC) a trial of certain preliminary issues be ordered before the trial of this action. The preliminary issues were:

(1) to determine if the 1st defendant is entitled to claim absolute privilege based on certain facts set out by the 1st defendant; and

(2) to determine if the 1st defendant is entitled to claim qualified privilege based on certain facts again set out by the 1st defendant.

Background Facts

This suit was initially filed in the High Court in Penang as Suit No. 22-213-1989. The 1st defendant, represented by the same firm of solicitors, entered appearance on 13 June 1989. The 2nd defendant then filed an application on 22 June 1989 to transfer the said case to the High Court at Kuala Lumpur and also for an order that the writ be set aside (encl. 8). On 14 June 1989 the plaintiff filed a certificate of non-appearance and interlocutory judgment against the 1st defendant.

In the meantime, the 1st defendant filed its defence on 28 June 1989. The defence had been accepted by the Registry of the High Court of Penang and on 13 November 1991 the 1st defendant applied by way of summons in chambers (encl. 27) to amend its defence. The court in the meantime fixed the hearing of encl. 8 to 18 December 1992. On 9 January 1992 the court granted the 1st defendant an order in terms of its encl. 27. The 1st defendant then filed its amended defence. Finally on 15 July 1993 in respect of encl. 8, the court only granted the order to transfer the case to the High Court of Kuala Lumpur. The registry in Penang then forwarded the entire file relating to this matter to the registry in Kuala Lumpur on 14 November 1994. Although the order to transfer the case was made on 15 July 1993, the 2nd defendant's solicitors only wrote to the registry of the High Court in Kuala Lumpur on 23 September 1998 enclosing a copy of the letter from the Penang registry. Parties then appeared before the Senior Assistant Registrar (SAR) on 21 August 1998 who fixed the hearing of the prayer of the 2nd defendant to set aside the plaintiff's writ in encl. 8 to 23 November 1998. Since counsel for the plaintiff did not appear in court on 23 November 1998 Mr. Arun who appeared for the 1st defendant and who also mentioned for the 2nd defendant obtained another hearing date to 21 December 1998. Upon transfer to the Kuala Lumpur High Court the Penang suit was given the present case number. A new set of solicitors then appeared for the plaintiff and the case was adjourned from 21 December 1998 to 17 February 1999. After much correspondence and postponements encl. 8 was fixed for hearing on 21 April 1999. It was again adjourned to 18 May 1999 and the court recorded that this was to be a final adjournment. Finally on 18 May 1999 the 2nd defendant withdrew encl. 8, namely, that part of the prayer seeking to strike off the plaintiffs defence, and obtained one month to file its defence.

In the meantime, the 1st defendant and all other parties concerned, blissfully oblivious that interlocutory judgment had already been obtained by the plaintiff against the 1st defendant on 14 June 1989 (encl. 12), applied by summons (encl. 54) to strike out the plaintiff's action for want of prosecution. On 12 July 1999 when encl. 54 came up for hearing before the learned SAR counsel for the 1st defendant sought an adjournment on the basis of wanting to reply the plaintiff's affidavit. Enclosure 54 was fixed for hearing on 13 September 1999. After hearing a preliminary objection of the plaintiff the court reserved judgment and on 30 September 1999 dismissed the plaintiff's preliminary objection with costs and fixed the hearing of encl. 54 to 16 November 1999. After hearing full argument the learned SAR allowed the 1st defendant's application on 26 November 1999 with costs. The plaintiff appealed against this decision and since this file (being a defamation suit) has

since been transferred to court 2, I heard the plaintiff's appeal and on 25 February 2000 allowed the plaintiff's appeal by setting aside the learned SAR's order dated 26 November 1999 and ordered that both the costs, before the learned SAR and the costs of the appeal be costs in the cause and directed the plaintiff to set the case down for trial by complying with O. 34 of the RHC. In the meantime, the 2nd defendant filed an application (encl. 71) to strike out the writ, not for want of prosecution but under O. 18 r. 19(1)(a) as showing no cause of action against the 2nd defendant. I fixed the hearing of encl. 71 to 17 May 2000. Plaintiff's solicitors sought a month's adjournment to settle the matter with the 2nd defendant. On 5 July 2000 the plaintiff informed me that the matter was settled with the 2nd defendant and that the plaintiff was withdrawing the suit against the 2nd defendant with costs. I then struck out the suit of the plaintiff against the 2nd defendant with costs to be paid to the 2nd defendant. I then fixed 7 August 2000 as case management date for the matter to proceed between the plaintiff and the 1st defendant.

The Present Application

The 1st defendant then applied by way of encl. 77 for the hearing of preliminary issues to be determined before trial. On 13 September 2000 I fixed the hearing of encl. 77 to 16 October 2000.

Counsel for the 1st defendant informed the court that he was not ready to proceed with his application whilst counsel for the plaintiff confirmed his readiness to proceed. Mr. Arun then referred me to encl. 84 which was his firm's letter to the court dated 13 October 2000 requesting for an adjournment. It is necessary for me to reproduce the entire letter which reads as follows:

Rujukan Kami: SD 1075340(JK)

13hb Oktober 2000

Setiausaha Yang Arif Hakim
Mahkamah Sivil 2
Wisma Denmark
Mahkamah Tinggi Kuala Lumpur Serahan Tangan

Tuan,

Per: Kuala Lumpur High Court Suit No.: S2(S4)-22-549-94
Beh Hai Moy -vs- i. Kwong Yik Bank Berhad
ii. Nordin Torji & Yusoff Ahmad

Kami merujuk kepada tindakan di atas di mana kami mewakili pihak Defendan Pertama dan kepada permohonan pihak Defendan Pertama yang ditetapkan untuk bicara pada hari Isnin, 16 haribulan Oktober 2000.

Ingin dimaklumkan bahawa kami terpaksa memohon pengangguhan bicara tersebut memandangkan yang pihak kami telah berdasarkan cabaran yang diambil di dalam Afidavit Jawapan Plaintif yang diikrarkan pada 26 haribulan September 2000 memfailkan permohonan bagi meminda semula Pernyataan Pembelaan Yang Dipinda yang difailkan di dalam tindakan ini.

Kami juga telah hari ini menyerahkan satu Afidavit Jawapan terhadap Afidavit Plaintif itu dan difahamkan yang pihak Plaintif ingin mengambil arahan atas Afidavit tersebut. Peguam pihak Plaintif telah menyatakan bahawa di dalam keadaan ini mereka tidak akan membantah kepada permohonan kami untuk penangguhan itu tetapi mereka akan membantah kepada pemindaan Pernyataan Pembelaan bila permohonan pemindaan dibicarakan.

Kami berbesar hati jika surat ini dapat dibawa ke perhatian Yang Arif Hakim. Pihak kami akan hadir di Mahkamah pada hari Isnin, 16 haribulan Oktober 2000.

Permohonan pemindaan itu telahpun difailkan di bawah satu Perakuan Segera.

Yang benar,

Sgd.

Counsel's request for an adjournment was on the basis of the challenge taken by the plaintiff that since the 1st defendant had not pleaded absolute privilege in its defence it cannot ask for this issue to be tried as a preliminary issue. The 1st defendant's request that it ought to amend its defence clearly showed that as the application, encl. 77, stood, the 1st defendant had no leg to stand on. It would have been totally unfair to the plaintiff if I had conceded to the 1st defendant's application for an adjournment.

The 1st defendant has filed a defence although it had in my view no right to file a defence at all since interlocutory judgment had already been given against it and the entire file shows that there has been no application made by the 1st defendant to set aside the said judgment. I agree that the plaintiff and her solicitors had been indolent and had failed to notify the 1st defendant that they had indeed taken interlocutory judgment against the 1st defendant. I am of the view that the 1st defendant's defence ought to have been rejected by the registry.

Coming back to encl. 77, Mr. Arun conceded that since the issue of absolute privilege had not been raised in the defence it cannot be determined as a preliminary issue, and that it was on this ground that he was seeking an adjournment. I refused his request on the basis that this case, which was filed in 1989, had already taken 11 years to date. Further, before filing the application, encl. 77, to try the issues as preliminary issues the 1st defendant failed to at least consider its defence. It was an absolute waste of this court's

time and an abuse of the process and would be tantamount to giving the 1st defendant an unfair advantage over the plaintiff if I had granted the adjournment. Mr. Arun conceded that without the amendment to the statement of claim "the application is doomed to failure". With such frank admission, the court commiserated with the 1st defendant and indicated that it was prepared to listen to counsel's request if he applied to withdraw the said application with liberty to refile, after he had applied and obtained an order to amend the defence. The 1st defendant had in fact on 13 October 2000 filed an application to amend. It was in the light of this that the court made such an indication. I was surprised with counsel's reply that he could not withdraw the application for reasons best known to himself. It indicated to me of an uncompromising stand taken by the 1st defendant in the face of an obvious and blatant error on its part and notwithstanding the fact that the court was willing to give it another chance. Faced with such a stand by the 1st defendant, I had no choice but to dismiss the application with costs.

There is one final point I must consider. In my view this is not an appealable issue. I had not gone into the merits. Counsel could well have proceeded to apply to amend. Yet the 1st defendant has persisted with this appeal.